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June 21, 1991

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Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

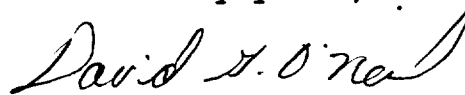
Re: Deas Communications, Inc.  
File No. BPH-910208MB

Dear Ms. Searcy:

Deas Communications, Inc., by its attorneys, hereby files an original and six copies of its "OPPOSITION TO PETITION TO DENY" in this proceeding.

Please contact the undersigned directly if there are any questions concerning this matter.

Sincerely yours, .

  
David G. O'Neil

DGO:do  
Enclosures (7)

RECEIVED

JUN 21 1991

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of )  
 )  
DEAS COMMUNICATIONS, INC. )  
 )  
For a Construction Permit for a )  
New FM Station on Channel 240A )  
Healdsburg, California )

File No. File No. BPH-910208MB

To: The Chief, Mass Media Bureau

OPPOSITION TO PETITION TO DENY

Deas Communications, Inc. ("Deas Communications"),  
pursuant to Section 73.3584 of the Commission's Rules and by its  
attorneys, hereby submits its Opposition to Mr. William J.  
Smith's ("Smith") "Petition to Deny". Smith's petition does not  
state facts sufficient to establish the reasonableness of a  
probable injury of a substantial nature and therefore he does not  
have standing to file a petition to deny. In addition, Smith has  
failed to meet his burden of proving that Deas Communications'  
proposed transmitter site will not pass local zoning laws. In  
support thereof, the following is hereby shown:<sup>1</sup>

Background

1. On February 8, 1991, Deas Communications filed a  
construction permit application for a new FM radio broadcast  
station at Healdsburg, California. Deas Communications  
affirmatively certified in Section VII of its application that it

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<sup>1</sup> On June 7, 1991, Deas Communications filed a "Request for  
Extension of Time." Smith did not file an opposition to this  
request.

has reasonable assurance of the availability of the property for its proposed transmitter site from Lucy Diggs, the owner of the property.

2. On May 31, 1991, Smith filed a petition to deny the application of Deas Communications and two other applicants for new facilities at Healdsburg.<sup>2</sup> Smith claims that Deas Communications does not have reasonable assurance of a transmitter site because local zoning laws and a zoning decision involving an existing broadcast station may prohibit Deas Communications from building a tower on Diggs' property.

#### Standing

3. Smith makes no effort to demonstrate any standing to file a petition to deny. Section 309(d)(1) of the Communications Act requires that any party filing a petition to deny must show that the petitioner is a party in interest, that a grant of the challenged application would be inconsistent with the public interest, and support such allegations with an affidavit of a person with personal knowledge of the facts recited. Petition for Rule Making to Establish Standards for

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<sup>2</sup> Certain of the arguments raised in this opposition also apply to Smith's case against all three applicants. Deas Communications disagrees with the assertion raised by Beckwith Communications, Inc. ("Beckwith") that Beckwith's proposal will have less of an environmental impact than Deas Communications' proposal. Beckwith's reliance upon the bare fact that Deas Communications is located .5 miles closer to the proposed KHTT site is irrelevant. Beckwith fails to take into account that Deas Communications proposes a 69 foot pole, as compared to Beckwith's 80 foot pole.

Determining the Standing of a Party to Petition to Deny a Broadcast Application, 82 FCC 2d 89, 93-94 (1980). Smith failed to provide an affidavit to support the allegations contained in his petition to deny. His petition to deny is not executed under the penalty of perjury. Because Smith has failed to provide an affidavit to support the allegations contained in his petition to deny, he lacks standing to file such a petition.

#### Availability of Site

4. The Commission must deny Smith's petition to deny for failure to meet the strict test for establishing a site availability issue. The Commission presumes an applicant has reasonable assurance of a transmitter site and will not disturb this presumption unless a reasonable showing is made that the applicant can not obtain approval from local zoning officials. See Sunshine Broadcasting, Inc., 1 FCC Rcd 174, 174 (1986) (denying petition for addition of site availability issue absent negative action by local zoning board); San Francisco Wireless Talking Machine Co., 47 RR 2d 889, 893 (1980) (denying petition for site availability issue because applicant need not have advance approval of government authorities in order to have reasonable assurance of site availability and absent reasonable showing by petitioner of improbability of approval by appropriate authorities, assumption is that approval will be forthcoming); Alden Communications Corp, 102 FCC 2d 518, 520 (Rev. Bd. 1985) (zoning approval assumed absent indications that such approval

unlikely to occur); Gainesville Media, Inc., 59 FCC 2d 382, 385 (Rev. Bd. 1976) (refusing to add site availability issue based on opinion differences among local zoning officials and not actual reluctance by local zoning board to authorize radio tower); Radio Ridgefield, Inc., 47 FCC 2d 106, 110 (Rev. Bd. 1974) (refusing to grant petition to add site availability issue, noting that the Commission is reluctant to add site availability issues based on predictions of local counsel or individual members of zoning commissions); Midwest Cable & Satellite, Inc., 1 FCC Rcd 746, 747 (Common Carrier Bur. 1986) (denying petition for addition of site availability issue based on declaration from representative of local zoning board where declaration did not specifically state that application would not be approved)<sup>3</sup>

5. Smith has failed to provide any specific evidence that the Sonoma County Department of Planning ("Sonoma County") will refuse to authorize Deas Communications to construct its proposed tower. Smith's reliance on local zoning ordinances and an unrelated zoning decision fails to provide any support for his contention that Sonoma County will refuse to permit Deas

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<sup>3</sup> For additional cases, see Edward G. Atsinger, 29 FCC 2d 443, 451 (Rev. Bd. 1971) (denying petition for site availability issue where opinion of one member of zoning board did not represent decisions of entire zoning board); John Hutton Corp., 27 FCC 2d 214, 215-16 (Rev. Bd. 1971) (refusing to add site availability issue where petitioner failed to provide evidence of reluctance by local zoning officials to authorize construction of tower); Ditmer Broadcasting, Co., 21 FCC 2d 391, 394 (Rev. Bd. 1970) (declining to add site availability issue absent specific showing that zoning request would be denied); Lester H. Allen, 20 FCC 2d 478, 481 (Rev. Bd. 1969) (denying petition to add site availability issue based upon unsworn testimony of local zoning official).

Communications to construct a broadcast tower. The local zoning ordinances reflect a general zoning plan and do not specifically preclude construction of a broadcast tower. For example, PF-2u, the zoning ordinance cited by Smith, permits construction of a broadcast tower provided that certain criteria are met. Deas Communications has reviewed PF-2u and intends at this time to satisfy all conditions of that ordinance. Declaration of Mr. Deas at ¶1 (Exhibit A). Smith has failed to provide any evidence that Deas Communications's proposed tower would not meet the requirements of PF-2u. Smith's failure to make this showing alone mandates dismissal of his petition to deny. See Midwest Cable & Satellite, Inc., 1 FCC Rcd 746, 747 (Common Carrier Bur. 1986) and related cases discussed in ¶5, supra.

6. Deas Communications has had several discussions with staff members of Sonoma County about its proposed tower. Declaration of Mr. Deas at ¶2. Based on these discussions, Deas Communications believes that Smith has no basis for asserting that Sonoma County will deny Deas Communications' proposed tower. Id. This is not surprising when it is noted that Deas Communications only proposes a 69 foot pole, of which less than 10 feet will be above the tree line. Id. The Commission will not add a site availability issue based on a mere difference of opinion as to whether local officials will sanction a site. Sunshine Broadcasting, Inc., 1 FCC Rcd 174, 174 (1986); Gainesville Media, Inc., 59 FCC 2d 382, 385 (Rev. Bd. 1976);

Radio Ridgefield, Inc., 47 FCC 2d 106, 110 (Rev. Bd. 1974);  
Edward G. Atsinger, 29 FCC 2d 443, 451 (Rev. Bd. 1971).

7. Smith's reliance upon Salinas Broadcasting Limited Partnership, 5 FCC Rcd 1613 (Rev. Bd. 1990) and Teton Broadcasting Limited Partnership, 1 FCC Rcd 518 (1986) is misplaced. In Salinas Broadcasting, the Review Board added a site availability issue against an applicant based on a specific, sworn representation by the Chairman of the local zoning board stating the applicant by name and definitively stating that the board would not authorize the applicant's proposed tower. 5 FCC Rcd at 1614. Similarly, in Teton Broadcasting, the Commission added a site availability issue against an applicant based on a specific, sworn representation by the Chairman of the local zoning board stating that the board had already denied the applicant's proposed tower. 1 FCC Rcd at 519-20. Both Salinas Broadcasting and Teton Broadcasting support the proposition that specific testimony concerning a specific applicant is necessary in order to add a site availability issue. Absent such a showing, the Commission will not add a site issue, as it declined to do against another applicant in Teton Broadcasting, concluding that a letter from an official stating the mere possibility of using the site failed to meet the reasonable showing standard necessary to add a site availability issue. Id. at 519.

8. Smith has failed to make such a showing in this instance. His reliance upon a decision by Sonoma County denying a proposal to construct a new tower for KHTT is totally

inapposite. In that instance, KHTT proposed constructing a 407 foot high radio tower, the highest structure in Sonoma County. Deas Communications proposes a 69 foot high radio pole, approximately one-sixth the height of the KHTT tower. Because KHTT proposed the highest tower in Sonoma County, the staff report addressed several concerns, such as its potential visual impact and local air traffic safety. Such concerns are not applicable to Deas Communications' proposed 69 foot pole. Because Deas Communications proposes locating its pole behind a ridge, the tower essentially will be hidden from the public, including Smith. Similarly, the Federal Aviation Administration ("FAA") has advised Deas Communications that its short tower will not pose a hazard to air safety.<sup>4</sup> Finally, the construction of a 72 foot cellular tower at Fitch Mountain, five miles east of Deas Communications' proposed site, Declaration of Mr. Deas at ¶3, lends further credence to the likelihood of Sonoma County authorizing Deas Communications' proposed tower.

9. Smith provided only a copy of the staff report and failed to provide a copy of the decision by Sonoma County denying the KHTT tower. Thus, it is impossible to determine the ultimate rationale for denying the KHTT tower. It is noteworthy that because PF-2u provides interim guidelines and that Sonoma County denied the KHTT tower approximately January 28, 1990, there is no way of determining whether Sonoma County has since adopted

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<sup>4</sup> Deas Communications will provide the Commission with a copy of the FAA determination as soon as it receives the hard copy from the FAA.



permanent guidelines. In any event, these interim guidelines can in no way be fully dispositive of how Sonoma County will handle Deas Communications' proposal.

10. The location of Deas Communications' proposed tower is essential for providing an adequate signal over Healdsburg and to avoid being short-spaced to other stations operating on Channel 240A. Declaration of Mr. Deas at ¶4. Mt. Jackson, the site proposed by Smith, will not provide adequate coverage of Healdsburg and is short-spaced. Id. In addition, Mr. Smith's petition to deny would exclude a large geographical area, encompassing Big Ridge, Wallace Creek, and Dry Creek Valley, making it virtually impossible to find an appropriate site to provide an adequate signal over the city of Healdsburg as required by the rules of the Federal Communications Commission

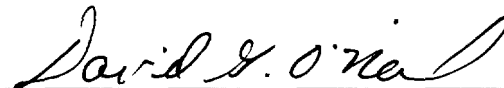
#### Conclusion

11. Mr. Smith's failure to provide an affidavit for his allegations contained in his petition to deny mandates that the Commission deny his petition for failing to make any demonstration of standing. Smith has also failed to provide specific factual support for his allegations of lack of site availability for Deas Communications. Commission precedent clearly states that absent such specific facts, the Commission will not add a site availability issue against an applicant.

WHEREFORE, for the foregoing reasons, Deas Communications, Inc., respectfully requests that the Commission deny the "Petition to Deny" filed by Mr. Smith.

Respectfully submitted,

DEAS COMMUNICATIONS, INC.

A handwritten signature in cursive script, reading "David G. O'Neil", is written over a horizontal line.

Lee W. Shubert, Esq.  
David G. O'Neil, Esq.

HALEY, BADER & POTTS  
2000 M Street, N.W.  
Suite 600  
Washington, D.C. 20036  
(202) 331-0606

Its Attorneys

June 21, 1991

### DECLARATION OF MARIO EDGAR DEAS

I, Mario Edgar Deas, declare that I am President, a Director, and sole voting shareholder of Deas Communications, Inc., an applicant for a construction permit for a new FM radio broadcast station for Healdsburg, California. I have reviewed the petition to deny the application of Deas Communications filed by Mr. William J. Smith and have prepared this declaration in response to his petition.

1. I would note at the outset that I have reviewed ordinance PF-2u and affirmatively state that Deas Communications intends to satisfy all conditions required by that ordinance.

2. I have had several discussions with staff members of the Sonoma County Department of Planning ("Sonoma County") about Deas Communications' tower proposal and have no reason to believe that Sonoma County will deny Deas Communications' application. Deas Communications proposes a 69 foot tower. Less than 10 feet of the tower will be above the current tree line.

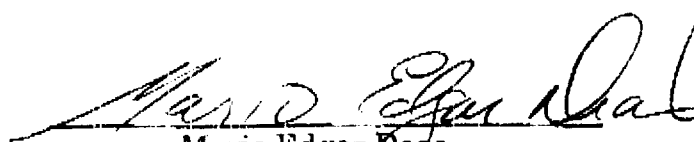
3. A 72 foot cellular tower has been constructed on Fitch Mountain, five miles east of Deas Communications' proposed site, as described in further detail in Exhibit A-1 attached to this declaration. The KHTT proposal that Sonoma County denied was over 400 feet high. Given the construction of a 72 foot tower and that Deas Communications proposes a 69 foot tower, there is no basis for Mr. Smith's allegations that the KHTT denial indicates that Sonoma County will deny Deas Communications' proposed tower.

4. Elliot Klein, Deas Communications' engineer, has informed me that Deas Communications' proposed tower location is essential for coverage of the Healdsburg service area and to avoid being short-spaced to other stations operating on Channel 240A. That coverage and spacing proposal is not available from Mt. Jackson, a site suggested by Mr. Smith. In addition, Mr. Smith's petition to deny would exclude a large geographical area, encompassing Big Ridge, Wallace Creek, and Dry Creek Valley, making it virtually impossible to find an appropriate site to provide

an adequate signal over the city of Healdsburg as required by the rules of the Federal Communications Commission.

I have read the foregoing consisting of two pages and reviewed the enclosed attachment and declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 21 day of June, 1991.

  
Mario Edgar Deas

CERTIFICATE OF SERVICE

I, Jennifer Britt-Young, a secretary in the law offices of Haley, Bader & Potts, hereby certify that I have on this 21st day of June, 1991, sent copies of the foregoing "OPPOSITION TO PETITION TO DENY" by first-class United States mail, postage prepaid, to the following:

Roy J. Stewart<sup>1/</sup>  
Chief, Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W.  
Room 314  
Washington, D.C. 20554

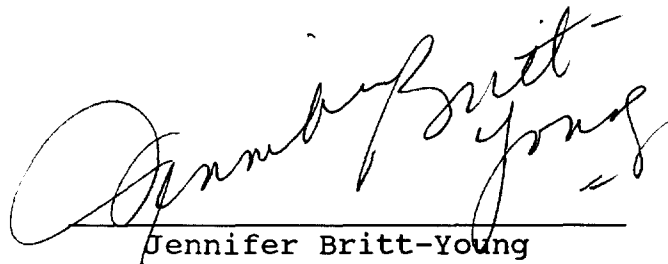
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Jennifer Britt-Young

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1/ Hand Delivered.